

FEDERAL MARITIME COMMISSION

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INFORMAL DOCKET NO. 1647(I)

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GRANITEVILLE COMPANY

v.

SCARADE LINES

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ORDER ADOPTING SETTLEMENT OFFICER'S DECISION

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This proceeding is before the Federal Maritime Commission ("Commission") upon its determination to review the Settlement Officer's decision denying reparation to the complainant, Graniteville Company ("Graniteville"). For reasons stated below, the Commission is adopting the Settlement Officer's decision with clarifications.

BACKGROUND

Graniteville initiated this proceeding by filing a complaint against Scarade Lines ("Scarade") and Hohenstein & Company, Inc. ("Hohenstein")<sup>1</sup> seeking damages of \$865.00 and requesting that the informal procedures of Subpart S, 46 C.F.R. §§ 502.301-305, be employed.<sup>2</sup> Graniteville did not invoke specific sections of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. §§ 1701-1720, but

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<sup>1</sup> Hohenstein, an agent for Scarade, was subsequently dismissed from this proceeding.

<sup>2</sup> There is some question whether Respondent was adequately served with the complaint. However, given our determination on the merits, this issue has become moot.

rather alleged that Scarade did not file a tariff with the Commission.

Graniteville is engaged in the manufacture and sale of textiles. It purchases fabric from Tunisia which is shipped on a freight prepaid basis to the United States. In December 1989, Scarade issued a bill of lading for the carriage of two containers between La Goulette, Tunisia and Charleston, South Carolina. The shipper, Somotex, paid the freight charges and Graniteville was listed as the "notify party." Hohenstein subsequently provided Graniteville with an arrival notice of the shipment and included therein an invoice for two collect charges - one was a \$25 charge for transfer of documents and the other an \$840 terminal handling charge ("THC"). Graniteville's agent, Trans-Port International, Inc. ("Trans-Port"), paid the ocean carrier, Evergreen Line ("Evergreen") directly, per the instructions of Hohenstein. It also paid Hohenstein's document transfer charge. Graniteville reimbursed Trans-Port for these payments.

The gravamen of Graniteville's complaint is that Scarade is a non-vessel-operating common carrier ("NVOCC") that does not have a tariff on file with the Commission, and that, as a result, Scarade could not legally request payment of the subject charges.

#### SETTLEMENT OFFICER'S DECISION

The Settlement Officer found that Scarade is an NVOCC subject to the Commission's jurisdiction and that it has not filed a tariff with the Commission. The Settlement Officer rejected

Graniteville's suggestion that the THC did not apply in that trade. He concluded that, regardless of the practices of other carriers, Evergreen's tariff specifically provided for the subject charge.<sup>3</sup> He further found that the THC represented charges of a carrier (Evergreen) that had no relationship to Graniteville, and that they should have been referenced in Scarade's tariff, as should any charges due Hohenstein for its services.

The Settlement Officer concluded that Scarade violated section 8(a)(1) of the 1984 Act, 46 U.S.C. app. § 1707(a)(1), (by operating without a tariff) and might also have violated section 10(b)(1) of the Act, 46 U.S.C. app. § 1709(b)(1). However, he denied reparations to Graniteville because its claim involved "only expenditures made for the benefit of the shipper," rather than revenues retained by the NVOCC. The Settlement Officer relied on an earlier decision of the Commission under the Shipping Act, 1916 ("1916 Act"), First International Development Corporation v. Ship's Overseas Services, Inc., 20 S.R.R. 209 (1980) ("FIDCO"), reversed on other grounds, Ships' Overseas Services, Inc. v. Federal Maritime Commission, 670 F.2d 304 (D.C. Cir. 1981). He stated that the question would be more complex if the claim involved freight charges, but noted that those were prepaid in Tunisia and that the shipper was not a party to this proceeding. He further suggested, however, that the use of the word "shall" in section 11(g) of the 1984 Act, 46 U.S.C. app. § 1710(g), calls into question the

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<sup>3</sup> The tariff page submitted by Graniteville does contain a terminal handling charge of \$420 per container, effective February 3, 1989.

Commission's discretionary authority under FIDCO; i.e., to permit an NVOCC to retain out-of-pocket expenditures made for the benefit of the shipper.

#### DISCUSSION

The basic question presented in this proceeding is whether reparations can be awarded to a shipper based on an NVOCC's failure to file a tariff and, if so, the extent to which such reparations should be reduced by payments made for the benefit of the shipper. Section 8(a)(1) of the 1984 Act, 46 U.S.C. app. § 1707(a)(1), requires common carriers, including NVOCCs, to file tariffs showing all their rates and charges. In addition, section 10(b)(1) of the Act, 46 U.S.C. app. § 1709(b)(1), prohibits common carriers from charging different compensation for transportation than the rates and charges that are shown in their tariffs. Section 11(a), 46 U.S.C. app. § 1710(a), permits any person to seek reparations for any injury caused to the complainant by a violation of the 1984 Act and pursuant to section 11(g), 46 U.S.C. app. § 1710(g), the Commission must direct payment of reparations for "actual injury" caused by a violation of the Act.

In FIDCO, the Commission held that the collection of untariffed rates could cause injury for which reparations may be granted under the 1916 Act. The Commission further held, however, that even though a carrier may not collect charges based on an untariffed rate, the Commission could permit the carrier to retain "out of pocket expenditures made for the benefit of the shipper."

As a result, the amount the Complainant there would have paid for the ocean transportation was subtracted from the amount collected by the untariffed NVOCC. The Commission's reduction of reparation was based on its discretionary authority to award reparations under the 1916 Act. Although, under the 1984 Act, the Commission has no similar discretion - i.e., it must award reparation for actual injury - we nonetheless reach a similar result.

When an NVOCC collects an untariffed charge under the 1984 Act, that action has caused "actual injury" to a shipper because amounts in addition to actual disbursements would have been included in the amount collected. Presumably, however, the shipper has received something that it desired, the transportation of its cargo from A to B. We conclude, therefore, that the shipper's "actual injury" is whatever it paid the NVOCC, less whatever payments were made by the NVOCC that the shipper would otherwise have had to pay. This will permit shippers to obtain relief from an NVOCC's failure to adhere to the tariff filing requirements of the 1984 Act, while at the same time ensuring that they do not reap an unwarranted windfall.<sup>4</sup>

Applying these principles to the instant case, it should first be noted that the untariffed transportation charges for Scarade's services were paid by the overseas shipper, Somotex, because the containers were shipped "freight prepaid." However, the THC assessed by Evergreen was paid by Graniteville, directly to the

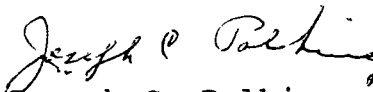
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<sup>4</sup> This decision applies only to an NVOCC's failure to file a tariff and has no effect on a similar violation by an ocean common carrier.

ocean carrier, at the instruction of Hohenstein, Scarade's agent. Whether Graniteville, who was not the shipper on the bill of lading but rather the "notify party", was under an obligation to pay the THC when invoiced by Scarade's agent, Hohenstein, is dubious. In any event, however, these charges were properly assessed against the containers by Evergreen, pursuant to its tariff, and they were for the shipper's benefit. As a result, the THC could not be included in any reparations award based on an NVOCC's failure to file a tariff.

THEREFORE, IT IS ORDERED That the decision of the Settlement Officer is adopted; and

IT IS FURTHER ORDERED That this proceeding is discontinued.  
By the Commission.

  
Joseph C. Polking  
Secretary